Suppuletchimi v Palmco Bina Sdn Bhd

HIGH COURT (PENANG) — CIVIL SUIT NO 22–384–93
VINCENT NG J
2 MARCH 1994

Civil Procedure *— Pleadings — Striking out — No reasonable cause of action under O 18 r 19(1)(a) — Whether court can decide merits of case by reference to affidavits — Discretion of court under O 92 r 4 — Rules of the High Court 1980 O 18 r 19(1)(a), (2) & O 92 r 4*

Civil Procedure *— Pleadings — Striking out — Affidavit in support — Whether prima facie evidence ought to be adduced — Information to be contained in affidavits — What the courts should look at in determining whether there is a reasonable cause of action — Rules of the High Court 1980 O 18 r 19(1)*

Civil Procedure *— Pleadings — Striking out — Whether plaintiff has satisfied court that he has bona fide or prima facie cause of action — Rules of the High Court 1980 O 18 r 19(1)*

Land Law *— Building — Whether adjacent structure part of building — Whether structure 'appurtenant or appertaining' to building — Close juxtaposition of structure — Separate assessment paid to municipal council — Local Government Act 1976*

Civil Procedure *— Pleadings — Striking out — Affidavit in support — Minimum evaluation approach — Whether court should adopt optimum evaluation approach in striking out actions*

The defendants were building contractors who entered into a joint-venture agreement with Sg Ara Holdings Sdn Bhd ('Sg Ara') to develop land which encompassed an area in which the plaintiff resided with several others. The plaintiff's husband, Muniandy, held a licence No D3/41, issued by Sg Ara, to occupy house No 107, Block E, Mukim 12, Sungai Ara, Pulau Pinang ('house No 107'). Adjacent to house No 107 was a structure known as No TI 866. Staying with Muniandy were ten other family members, including Muniandy's two brothers, Tharumalingam and Ganapathy. Muniandy and Ganapathy authorized Tharumalingam to negotiate the amount of compensation on their behalf. Consequently, the defendants entered into an agreement with Tharumalingam ('the agreement') that house No 107 was to be demolished 'together with all buildings and structures (if any) appurtenant or appertaining to' house No 107, and, as compensation, the defendants were to construct for him, free of charge, a double storey detached house. After having secured the agreement, Tharumalingam wrote to the defendants saying that he was not the owner of No TI 866 which, he said, belonged to the plaintiff. The plaintiff argued that No TI 866 was a separate house, bearing a separate registered address, which was not part of or a structure appurtenant or appertaining to house No 107, as she had paid a separate assessment rate in respect of No TI 866 to the Penang

City Council. The plaintiff obtained an injunction restraining the defendants from demolishing No TI 866. It was undisputed that the plaintiff had never held a land occupation licence.

The defendants applied for, inter alia: (i) the injunction to be set aside; and (ii) the plaintiff's writ to be struck off under O 18 r 19(1)(a) or (b) or (c) of the Rules of the High Court 1980 ('the RHC') on the grounds that it was vexatious, frivolous and an abuse of court process for being an attempt to secure the building of another house free of charge from the defendants over and above what her husband Muniandy was entitled to.

Held, allowing the defendants' applications:

(1) The statement of law that in applications made under O 18 r 19(1)(a) of the RHC, the only issue for determination is whether the pleading or endorsement on the face of it discloses a reasonable cause of action or defence and, by virtue of O 18 r 19(2), averments in affidavits should be disregarded, is not of absolute application. This position only applies if the court does not decide to invoke its inherent jurisdiction under O 92 r 4 which states that nothing in the RHC shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or abuse of the process of the court. Clearly O 92 r 4 would appear to override r 19(2). As such, even in an application under O 18 r 19(1)(a), the court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits whether the claim discloses a reasonable cause of action or defence.

(2) The court recognizes that in summary proceedings, a trial on affidavits would be clearly wrong. But, it is still incumbent upon the court to determine whether issues could more appropriately be decided without the expense of a full trial. Prima facie evidence which is capable of being adduced by affidavit evidence ought to be so adduced even in summary proceedings. The crucial question the court would have to ask itself is: (i) whether the evidence essential to make out a reasonable prima facie cause of action or triable issue of fact are of the nature such that they are adduceable by affidavit evidence, and if so; (ii) whether such prima facie evidence had been adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must contain particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable prima facie cause of action or a triable issue or issues of fact or law in the defence.

(3) The mere assertion in an affidavit does not ipso facto provide immunity against the claim or defence from being struck out under r 19(a), (b) or (c) (or leave to defend refused in an O 14 matter). The court must look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a bona fide or prima facie cause of

action, and the defendants (in an application to strike off the defence) have not only raised an issue but also that the issue is, prima facie, triable. The defendants have to make out a good prima facie defence only if the plaintiff's case is also prima facie a good one.

(4) In the present case, the plaintiff had failed to disclose a prima facie cause of action in any of her affidavits. Besides the fact that she did not hold a licence to occupy No TI 866 or any other building thereabouts, she did not produce even an iota of evidence to support her claim to equitable interest. On the balance of probabilities she had also failed to show why No TI 866 should not be considered part of the house No 107 in view of the close juxtaposition of the two structures. Such prima facie evidence is eminently adduceable and ought to be adduced by affidavit evidence, if the court is to carry out an optimum evaluation to determine whether there was a reasonable cause of action. Furthermore, under the Local Government Act 1976 every structure or building has to be assessed and the fact that assessment was paid on No TI 866 does not ipso facto signify that same should not be considered an appurtenance of house No 107. The affidavits confirm the court's conclusion that the plaintiff had no reasonable ground for proceeding with this action and it was a despicable attempt to secure double compensation. Leave to appeal to the Supreme Court was refused.

Obiter:

Due to the current position of the courts being bridled with an ever increasing backlog of cases, the minimum evaluation approach in the past, of affidavit evidence when deciding the issue of whether there is a reasonable cause of action in the claim, or triable issue in a defence, would have to give way to the optimum evaluation approach. In this fresh approach it is also envisaged that, in appropriate cases, O 33 r 2, O 14, O 34 r 8 and O 28 r 4, besides O 18 r 19 discussed above, would increasingly be employed by parties and courts for expeditious disposal of cases.

[Bahasa Malaysia summary

Defendan merupakan kontraktor pembinaan yang telah mengikat suatu perjanjian usahasama dengan Sg Ara Holdings Sdn Bhd ('Sg Ara') untuk memajukan tanah yang meliputi suatu kawasan yang dihuni oleh plaintif dan beberapa orang lain. Suami plaintif, Muniandy, memegang suatu lesen No D3/41, yang dikeluarkan oleh Sg Ara, untuk menduduki rumah No 107, Blok E, Mukim 12, Sungai Ara, Pulau Pinang ('rumah No 107'). Bersebelahan dengan rumah No 107 terletak suatu binaan yang dikenali sebagai No TI 866. Turut menduduki rumah itu bersama Muniandy adalah sepuluh orang ahli keluarga lain, termasuk dua adik lelaki Muniandy, iaitu Tharumalingam and Ganapathy. Muniandy dan Ganapathy telah

memberi kuasa kepada Tharumalingam untuk merundingkan jumlah pampasan bagi pihak mereka. Sebagai akibatnya, defendan telah mengikat suatu perjanjian dengan Tharumalingam ('perjanjian itu') supaya rumah No 107 dirobohkan 'bersama dengan semua bangunan dan struktur (jika ada) yang berkaitan atau berhubungan dengan' ('together with all buildings and structures (if any) appurtenant or appertaining to') rumah No 107, dan, sebagai pampasan, defendan akan membina untuknya suatu rumah dua tingkat yang berasingan secara percuma. Selepas mengikat perjanjian itu, Tharumalingam telah menulis kepada defendan dan menyatakan bahawa beliau bukanlah tuan punya No TI 866 yang dikatakannya dipunyai oleh plaintif. Plaintif berhujah bahawa No TI 866 merupakan suatu rumah berasingan, yang mempunyai alamat berdaftar berasingan, yang tidak merupakan sebahagian daripada ataupun suatu struktur yang berkaitan atau berhubungan dengan rumah No 107, kerana beliau telah membayar kadar cukai pintu yang berasingan berkenaan dengan No TI 866 kepada Majlis Perbandaran Pulau Pinang. Plaintif telah mendapatkan suatu injunksi untuk menghalang defendan daripada merobohkan No TI 866. Adalah tidak dipertikaikan bahawa plaintif tidak pernah memegang suatu lesen pendudukan tanah.

Defendan telah memohon untuk, antara lain, supaya: (i) injunksi itu diketepikan; dan (ii) writ plaintif dibatalkan di bawah A 18 k 19(1)(a) atau (b) atau (c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa ianya menyusahkan, remeh dan adalah suatu penyalahgunaan proses mahkamah kerana ianya merupakan suatu percubaan untuk mendapatkan pembinaan sebuah lagi rumah oleh defendan secara percuma selain daripada apa yang suaminya Muniandy berhak mendapatkan.

Diputuskan, membenarkan permohonan defendan:

(1) Pernyataan undang-undang bahawa di dalam permohonan yang dibuat di bawah A 18 k 19(1)(a) KMT, isu tunggal untuk diputuskan adalah sama ada pliding atau pengindorsan itu pada mukanya mendedahkan suatu kausa tindakan yang munasabah dan, mengikut A 18 k 19(2), penegasan di dalam afidavit semestinya tidak diendahkan, tidaklah terpakai secara mutlak. Kedudukan ini hanya terpakai jika mahkamah membuat keputusan supaya tidak menggunakan bidang kuasa sedia adanya di bawah A 92 k 4 yang menyatakan bahawa tidak ada apa-apa di dalam KMT yang akan dianggap sebagai menghad atau menjejaskan kuasa sedia ada mahkamah untuk membuat sebarang perintah yang diperlukan untuk menghalang ketidakadilan atau penyalahgunaan proses mahkamah. Adalah jelas bahawa A 92 k 4 nampaknya mengatasi k 19(2). Oleh yang demikian, walaupun di dalam suatu permohonan di bawah A 18 k 19(1)(a), mahkamah masih berhak, di bawah bidang kuasa sedia adanya, untuk memeriksa dan membuat keputusan mengenai kandungan afidavit, sama ada tuntutan itu mendedahkan suatu kausa tindakan atau pembelaan yang munasabah.

(2) Mahkamah mengiktiraf bahawa di dalam prosiding terus, suatu perbicaraan yang berdasarkan afidavit adalah jelas salah. Tetapi, masih menjadi kewajipan mahkamah untuk memutuskan sama ada isu-isu itu lebih sesuai diputuskan tanpa menanggung perbelanjaan suatu perbicaraan penuh. Keterangan prima facie yang boleh dikemukakan melalui keterangan afidavit seharusnya dikemukakan walaupun di dalam prosiding terus. Soalan yang sangat penting yang mahkamah mesti menanya dirinya ialah: (i) sama ada sifat keterangan yang diperlukan untuk menunjukkan suatu kausa tindakan atau isu fakta perlu bicara yang munasabah membolehkannya dikemukakan melalui keterangan afidavit, dan jika demikian; (ii) sama ada keterangan prima facie itu telah dikemukakan di dalam afidavit yang menyokong permohonan itu. Afidavit itu tidak seharusnya mengandungi penegasan kosong tetapi mesti mengandungi butir-butir untuk hujah serius yang mencukupi untuk memuaskan mahkamah bahawa terdapat suatu kausa tindakan munasabah yang prima facie atau isu fakta atau undang-undang perlu bicara munasabah yang prima facie di dalam pembelaan.

(3) Penegasan semata-mata di dalam suatu afidavit tidak secara ipso facto memberikan kekebalan kepada tuntutan atau pembelaan itu daripada pembatalan di bawah k 19(a), (b) atau (c) (atau penafian kebenaran untuk membela tindakan di dalam suatu perkara di bawah A 14). Mahkamah mesti melihat keadaan itu pada keseluruhannya dan menanya dirinya sama ada plaintif (di dalam suatu permohonan untuk membatalkan suatu tindakan) telah memuaskan mahkamah bahawa beliau mempunyai suatu kausa tindakan yang bona fide atau prima facie, dan defendan (di dalam suatu tindakan untuk membatalkan pembelaan) bukan sahaja telah menimbulkan suatu isu, tetapi juga bahawa isu itu prima facie perlu bicara. Defendan mesti menunjukkan pembelaan prima facie yang baik hanya jika kes plaintif juga suatu kes prima facie yang baik.

(4) Di dalam kes ini, plaintif gagal mendedahkan suatu kausa tindakan prima facie di dalam mana-mana afidavitnya. Di samping fakta bahawa beliau tidak memegang suatu lesen untuk menduduki No TI 866 atau mana bangunan dekat-dekat situ, beliau tidak mengemukakan walau sedikitpun bukti untuk menyokong tuntutannya bahawa beliau mempunyai kepentingan ekuiti. Pada imbangan kebarangkalian, beliau juga gagal menunjukkan kenapa No TI 866 tidak seharusnya dianggap sebagai sebahagian daripada rumah No 107 memandangkan kedudukan seiring dua buah struktur itu. Keterangan prima facie sedemikian amat boleh dikemukakan dan seharusnya dikemukakan melalui keterangan afidavit, jika mahkamah dikehendaki menjalankan penilaian optimum untuk memutuskan sama ada terdapat suatu kausa tindakan yang munasabah. Lebih-lebih lagi, di bawah Akta Kerajaan Tempatan 1976 setiap struktur atau bangunan mesti

ditaksirkan dan hakikat bahawa cukai pintu telah dibayar atas No TI 866 tidak secara ipso facto menandakan bahawa ianya tidak seharusnya dianggap sebagai berhubungan dengan rumah No 107. Afidavit-afidavit itu mengesahkan keputusan mahkamah bahawa plaintif tidak mempunyai alasan yang munasabah untuk meneruskan tindakan ini dan bahawa ia merupakan suatu percubaan yang keji untuk mendapatkan pampasan sekali ganda. Kebenaran untuk membuat rayuan kepada Mahkamah Agung ditolak.

Obiter:

Disebabkan kedudukan mahkamah masa kini yang dibebankan dengan lantukan kes yang semakin menambah, pendekatan lama iaitu menjalankan penilaian minimum atas keterangan afidavit apabila memutuskan isu sama ada terdapat suatu kausa tindakan munasabah di dalam tuntutan itu, atau suatu isu perlu bicara di dalam pembelaan itu, mesti digantikan dengan pendekatan penilaian optimum. Mengikut pendekatan baru ini, adalah juga dibayangkan bahawa, di dalam kes sesuai, A 33 k 2, A 14, A 34 k 8 dan A 28 K 4, selain daripada A 18 k 19 yang telah dibincangkan di atas, akan semakin digunakan oleh pihak dan mahkamah untuk mempercepatkan penentuan kes.]

Cases referred to

1 *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (refd)
2 *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (refd)
3 *United Overseas Bank Ltd v Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 (refd)
4 *Re ABZ (an infant)* [1992] 2 SLR 442 (refd)
5 *Bright Navigation Co Ltd v 'Eishin Maru', Owners of* [1988] 1 MLJ 482 (refd)
6 *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 (refd)
7 *Re Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14 (refd)
8 *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445 (refd)
9 *Hongkong and Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86 (refd)
10 *Low Fong Mei & Anor v Ko Teck Siang & Ors* [1989] 3 MLJ 140 (refd)
11 *Tan Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434 (refd)
12 *Khaw Kok Sin & Anor v Khaw Gim Leong Co Sdn Bhd & Ors* [1974] 1 MLJ 180 (refd)
13 *Pacific and Orient Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 (refd)

14 *Motor Emporium v V Arumugam* [1933] MLJ 276 (refd)
15 *Heng Joo See v Ho Pol Ling* (Divorce Petition No 94 of 1993) (unreported) (folld)
16 *Re Vernazza* [1959] 2 All ER 200; [1959] 1 WLR 622; [1960] AC 965; [1960] 2 WLR 135; [1960]1 All ER 183 (folld)
17 *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (folld)
18 *Pertama Malaysia Finance Bhd v Konrep Services Sdn Bhd & Ors* [1990] 1 CLJ 127 (refd)
19 *Saw v Hakim* (1888) 5 TLR 72 (refd)
20 *Chang Siew @ Chang Siew Kee & Ors v Chang Sang @ Chen Yen Sang & Anor* [1993] 1 CLJ 125 (refd)
21 *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 (HL) (refd)

Legislation referred to
Rules of the High Court 1980 O 92 r 4

Habib Rahman bin Seeni Mohideen (*Mohideen & Partners*) for the plaintiff.
Gerard Chan Weng Yew (*Lim Kean Siew & Co*) for the defendants.

Vincent Ng J: The defendants applied by way of a summons-in-chambers (encl 8) for:

i) the injunction (encl 5) dated 6 October 1993 restraining the defendants from demolishing a structure known as No TI 866, Sungai Ara, 11900, Pulau Pinang to be set aside;
ii) the writ of summons dated 6 October 1993 (encl 1) to be struck off under O 18 r 19(1)(a) or (b) or (c) of the Rules of the High Court 1980 ('the RHC');
iii) damages consequential upon the implementation of the said injunction, to be assessed by the senior assistant registrar; and
iv) costs of the action.

The defendants' case is as follows:

The defendants are building contractors who have entered into a joint-venture agreement with Sg Ara Holdings Sdn Bhd to develop a large area of land which encompasses an area in which the plaintiff resides with several others.

After entering into the joint-venture agreement the defendants, acting in concert with Sg Ara Sdn Bhd, agreed to give compensation to the genuine licensed occupiers of the land, whereby Sg Ara was to sell the land at fixed rates and the defendants to build houses of certain specifications free of charge for such occupiers.

In order to find out who were the legitimate licensed occupiers, a census was held in 1984 ('the said census').

According to the census record of licensees occupying the large area of land as at 20 December 1984 was inter-alia, a house No 107 Block E, Mukim 12 Sungei Ara, 11900 Pulau Pinang ('house No 107') occupied by one named Muniandy a/l Pavadai ('Muniandy') who held a licence No D3/41 issued by Sg Ara Holdings Sdn Bhd. Staying with Muniandy at the time of

A the census, were 10 other family members including the plaintiff who was the wife of Muniandy, and Muniandy's two other brothers namely Tharumalingam a/l Pavadai ('Tharumalingam'), and Ganapathy a/l Pavadai ('Ganapathy'). The details of the 11 occupiers and their relationship to Muniandy recorded in the census were as follows:

No	Name	IC No	Sex	Marital status	Date of birth	Relationship	Occupation
1	Muniandy a/l Pavadai	1346178	M	M	7/1/47	Licensee	Labourer
2	Suppuletchimi a/p Karpaya	4096621	F	M	8/7/57	Wife	–
3	Mazraviran a/l Krishnan	5230057	M	S	12/9/57	Brother-in-law	Labourer
4	Moganambal a/p Muniandy	BC D 650750	F	–	19/4/78	Daughter	–
5	Thyagarajan Pillay a/l Muniandy	BC C531401	M	–	9/4/74	Son	–
6	Vijayaletchumy a/p Muniandy	BC D165239	F	–	21/6/76	Daughter	–
7	Ganapathy a/l Pavadai	4240281	M	M	26/2/52	Brother	–
8	Raja Mani a/p Vaithanianathan	5336740	F	M	18/5/57	Sister-in-law	–
9	Tharumalingam a/l Pavadai	T126444	M	M	2/11/48	Brother	Army
10	Muniammal a/p Muthuvelu	4888289	F	M	5/8/55	Sister-in-law	–
11	Linggam	BC E500616	M	–	20/7/79		

On 23 October 1991, the defendants received a letter of even date from Muniandy, the plaintiff's husband and Ganapathy which confirmed that both of them had surrendered all their rights in respect of house No 107 to their mutual brother Tharumalingam. Consequent upon and pursuant to the said letter the defendants reached an agreement with Tharumalingam on compensation — which was subsequently reduced into writing vide a detailed written agreement dated 17 June 1993 ('said agreement') — wherein it was agreed that the house No 107 was to be pulled down and demolished at the latter's cost '*together with all buildings and structures (if any) appurtenant or appertaining to*' the house No 107, and the defendants were was to compensate Tharmalingam by constructing for him free of charge, a double storey detached house according to plans as detailed in the said agreement. Another agreement simultaneously executed between Tharumalingam and

Sg Ara Holdings Sdn Bhd in which the relevant land whereupon the said house was to be erected was sold to the former at RM2 per sq ft.

The letter dated 23 October 1991 from the two brothers, namely, Muniandy and Ganapathy (exh WPS 2 of encl 6), and the defendant's letter to Tharumalingam dated 9 June 1993 (exh WPS 3 of encl 6) read as follows:

Muniandy a/l Pavadai
Ganapathy a/l Pavadai
107, Block E, Mk 12
Sungai Ara

Penang
23 October 1991

M/s Palmco Bina Sdn Bhd
10 Lebuh Bishop
Penang

2 Sungai Ara Holdings Sdn Bhd

Dear Sirs,

Re: Desaria-Sungai Ara, Penang
House No 107, Block E, Mk 12,
Sungai Ara, Penang

We refer to the above matter and write to confirm that you are authorized to negotiate with our brother Tharumalingam a/l Pavadai (IC 0964386) in respect of any compensation with regard to the above.

Further, we also confirm that any compensation awarded by you for demolishing of the above property shall solely belong to our brother Tharumalingam a/l Pavadai and we have no objection whatsoever in you entering into any compensation agreement solely with our said brother.

We hereby confirm that we have relinquished all our rights, title and interest in the above house in favour of our brother Tharumalingam a/l Pavadai and we have no more claim of whatsoever nature in respect of the said house.

We hereby agree to indemnify you at all times against all actions, claims, suits that may arise against you as a result of you entering into any compensation agreement solely with the said Tharumalingan a/l Pavadai.

Yours faithfully,

—Sgd—
Muniandy a/l Pavadai
IC 1346178

—Sgd—
Ganapathy a/l Pavadai
IC 4240281

—Sgd—
Witness
MI Meerasa PJM
Taman Abidin
Block-E, G–6, Jalan Perak,
Pulau Pinang
Tel: 212006

—Sgd—
Witness
Tuan Ibrahim IC 4563738

Di hadapan saya
—Sgd—
NR Sundram
Pesuruhjaya Sumpah
(Commissioner for Oaths)

9 June 1993

Mr Tharumalingam a/l Pavadai
107 Block E
Mukim 12
Sungei Ara
11900 Penang

Dear Sir

Desaria, Sungei Ara (Penang)
House No 107 Block E, Mukim 12, Sungei Ara, Penang

We write to inform you that your temporary accommodation is ready for occupation.

We earnestly request you to make the necessary preparation to move into the temporary house provided to you as soon as possible and deliver to us vacant possession of the land which your present house No 107, Block E, Mukim 12, Sungei Ara, Penang is sited.

As per our various discussions, we are to confirm:

1 *Resettlement house*
You will be provided with a double storey detached house with four rooms. The land area is approximately 4,000sq ft. You need only to pay for the land at RM2 per sq ft to the landowner, Sungei Ara Holdings Sdn Bhd.

2 *Transitional house*
House No 205 Block E, Mukim 12, Sungei Ara, Penang is now available for your temporary accommodation.

3 *Stay at temporary house*
Your permanent resettlement house is being planned to be completed towards the end of 1995.

4 *Subsidy of electricity and water consumption*
While you are being temporarily accommodated at our transitional house, we shall pay for your electricity and water consumption to a maximum of RM50 per month. Any consumption over and above will be on your account.

5 *Installation of telephone services*
Should you require any telephone service, you will have to apply directly to the Authority and all expenses are on your account.

6 *Demolition of existing house*
After you have moved to the temporary house, you are required to demolish *house No 107 (and also any other structures)* within 14 days and hand over the site to us with vacant possession.

7 *Assistance*
If you should need any assistance from us in moving to the said house, we request that you give us some notice.

We look forward to your co-operation and we thank you very much in advance.

Yours faithfully
Palmco Bina Sdn Bhd

—Sgd—
Wong Pak Sun
General manager

cc The managing director
Sungei Ara Holdings Sdn Bhd

cc Lim Kean Siew & Co
(Attention: Ms Pamela Ong)

After the said Tharumalingam had received the letter dated 9 June 1993 from the defendants and after having secured the said agreement for the construction by the defendant of a double storey detached six bedroom house in his favour, he wrote a letter dated 9 July 1993 to the defendants to notify that he was not the owner of structure No 866 which, he said, belonged to the plaintiff. It is not without significance that he did not then disclose that the plaintiff was his sister-in-law and the wife of his brother Muniandy, the occupation-licence holder (who in turn had transferred his rights as a licensee to Tharumalingam).

Under cl 2 of the said agreement, Tharumalingam had, in consideration of a double storey detached house being erected free of charge for him, agreed to pull down, demolish and remove from the defendant's land the house No 107 '*and all buildings and structures (if any) appurtenant or appertaining to*' house No 107.

The pith and crux of the defendant's contention is as follows:

(a) Tharumalingam's undertaking in the said agreement 'to demolish ... the buildings and structures appurtenant or appertaining to' house No 107 should be construed to include structure No TI 866, as 'appertaining to' in *Words and Phrases Legally Defined* by John B Saunders is defined as 'belonging to';
(b) the initials TI in 'TI 866' and N/T in 'N/T 107' in the assessment bill (P1 in encl 2) meant respectively 'transient' and 'next to' and therefore structure No 866 was merely a structure dependant on the existence of house No 107;
(c) the plaintiff and her husband, Muniandy, had stayed in house No 107 and certain structures including structure No 866 were part of the appurtenants of house No 107. It is of significance that the earliest assessment bills for structure No 866 exhibited as 'P1' in encl 2 was for the year of assessment 1984 which was the year when the 1984 census was taken, and during which period the plaintiff would have got wind of possible provision of compensation by the landowners. Indeed, the plaintiff had disclosed in para 3 of her affidavit (encl 2) that she and her family were informed by 'Tuan Watts dan anak Tuan Brown' that they would be relocated in Sungei Ara;
(d) it is highly incredible for the husband, Muniandy, and the plaintiff, Supuletchimi a/p Karpaya, to live separately in structure No 866 and house No 107, there being no averment or suggestion that they were separated or divorced; and
(e) it is also very improbable that the results of the census completed many years ago upon which the plaintiff's brother-in-law had benefited, were unknown to the plaintiff and her husband and no steps were not taken to dispute same.

The common ground or undisputed facts are as follows:

(a) The plaintiff never paid for or held a land occupation licence, such as the Licence to Occupy No D 3/41 held by her husband, Muniandy, in respect of house No 107.

(b) The plaintiff was the wife of Muniandy who had paid for and held the said Licence No D 3/41.

(c) The occupants of house No 107 and premises No 866 were all the relatives of Muniandy.

(d) The plaintiff had paid the assessment for structure No TI 866, Block E, Mukim 12, Sg Ara (N/T 107, Block E, Mukim 12) since 9 August 1984.

(e) Tharumalingam a/l Pavadai was the brother of the plaintiff's husband, Muniandy a/l Pavadai (holder of Licence No D 3/41), who (Tharumalingam), had executed the said agreement which obliged him to 'pull down, demolish and remove (house No 107) *and all buildings. structures (if any) appurtenant or appertaining to*' house No 107.

For the above reasons, the defendants submit that the plaintiff's claim was vexatious, frivolous and an abuse of court process for being an attempt to secure the building of a further unit of double storey detached house free of charge from the defendants over and above what her husband Muniandy was entitled to.

The plaintiff's case is as follows:

(a) They denied the contents of the said census and the particulars therein.

(b) They said the structure No 866 was a separate house which was handed down to the plaintiff from her granduncle (not named) whereas house No 107 was handed down to Muniandy from the latter's parents.

(c) Structure No 866 was in fact house No TI 866 Block E, Mukim 12, Sg Ara and is not part of or a structure appurtenant or appertaining to premises No 107. It was thus a separate independent unit bearing a separate registered address.

(d) The plaintiff had paid a separate assessment rate in respect of premises No TI 866 vide Penang City Council assessment notices, three of which were exhibited as P-1 of encl 2.

(e) The plaintiff's granduncle had constructed premises No TI 866 at his own cost and with the verbal approval and promise in favour of permanent occupation of the then owner of land; and the plaintiff has been staying therein with her family since 1946.

The plaintiff thereby asserted that for reasons aforesaid, she had equitable rights over the land and structure No TI 866.

Be it noted that the plaintiff had filed her statement of claim on 10 January 1994, and only after the application dated 19 November 1993 for striking off had been filed by the defendants.

The proper issue to consider first in this application is prayer (ii) above, due to its decisive effect on prayer (i).

Prayer (ii) sought to have the writ of summons dated 6 October 1993 struck off under O 18 r 19 (1)(a) or (b) or (c) of the RHC so framed in the alternative rather than, eg, under (a) alone, presumably in part because it is often submitted that by virtue of O 18 r 19(2), averments in affidavits

should be disregarded or given little consideration in applications made under O 18 r 19(1)(a) of the RHC, as the only issue for determination in such applications should be whether the pleading or endorsement *on the face of it* discloses a reasonable cause of action or defence as the case may be. See *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor*.[1] See also *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd*.[2] This statement of law is not of absolute application — it is not entirely correct — as in my considered opinion, this position in law governs only if the court does not decide to invoke its inherent jurisdiction under O 92 r 4.

Even though O 18 r 19(2) provides that 'no evidence shall be admissible on an application under paragraph (1)(a)', yet O 92 r 4 states that '*nothing in these rules* shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.' Clearly O 92 r 4 would appear to override r 19(2). However, such a construction may not be necessary as in my opinion O 92 r 4 could be triggered into action only when the court, upon reading the affidavits, decides to exercise its inherent powers.

As such, even in an application under O 18 r 19(1)(a), the court would still be entitled, in its inherent jurisdiction, to look at and decide upon the contents of the affidavits. By the time that such applications come up for hearing, the parties would have had ample opportunities to cure by amendments, any shortfalls in drafting the pleadings, and the application for striking off would necessarily be based on the amended pleadings. It does not preclude the court from studying the affidavits to ask itself whether, from the affidavit evidence before the court, it is satisfied that the claim discloses a reasonable cause of action or defence as the case may be.

The courts of Singapore and Malaysia have considered the operation of O 92 r 4 of the RHC in a variety of situations — this Order being an overriding provision applicable to all other rules and provisions in the RHC. See *United Overseas Bank Ltd v Chung Khiaw Bank Ltd*;[3] *Re ABZ (an infant)*;[4] *Bright Navigation Co Ltd v 'Eishin Maru', Owners of*;[5] *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd*;[6] *Re Singapore Souvenir Industry (Pte) Ltd*;[7] *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)*[8] at pp 446–447; *Hongkong and Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore)*;[9] *Low Fong Mei & Anor v Ko Teck Siang & Ors*;[10] *Tan Lay Soon v Kam Mah Theatre Sdn Bhd*;[11] *Khaw Kok Sin & Anor v Khaw Gim Leong Co Sdn Bhd & Ors*;[12] *Pacific and Orient Sdn Bhd v United Engineers (M) Bhd*;[13] and *Motor Emporium v V Arumugam*.[14] As many of the rules are framed to prevent injustice in particular situations, the court may exercise its inherent powers concurrently or in the alternative. For example, apart from the specific grounds in the rules on which a court may order the endorsement on a writ or a pleading to be struck out under O 18 r 19 of the RHC, the court may so order on the basis of its inherent powers.

Again, the application of O 79 r 4 of the SCR — a provision similar to O 92 r 4 of the RHC which clearly also governs inter alia, O 14 and O 18

A r 19(1)(a) as well as (b), (c) and (d) applications — was considered in the Singapore case of *Heng Joo See v Ho Pol Ling*[15] wherein Coomaraswamy J restated with approval the definition put forward by Sir Jack Jacob, the former Senior Master of the Supreme Court in his article, 'The Inherent Jurisdiction of the Court' (1970) CLP 23 at p 51 which reads as follow:

B > ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

C A further authority for this inherent jurisdiction is found in the case of *Re Vernazza*,[16] wherein Lord Parker CJ held that in considering whether any proceedings were vexatious one was entitled to, and ought to, look at the whole history of the matter, and *it was not determined by whether the pleading disclosed a cause of action.* That indeed was the principle applied under the rules of court when application was made to strike out a pleading.
D And that though the pleading might be in order, the court, in its inherent jurisdiction, was entitled to look at affidavits as to the history of the matter, and if, in the light of that history, the action was vexatious, the pleading could be struck out and the action dismissed. This decision was affirmed by the Court of Appeal.

E Be it noted that even the Privy Council decision in *Tractors Malaysia Bhd v Tio Chee Hing*[17] does not preclude the court from examination of affidavit evidence, as their Lordships in that panel only said that they would be loth (disinclined rather than precluded) to differ from the opinion of the Federal Court (as it then was) had the matter depended upon the contents of the statement of claim alone (ie an application under O 18 r 19(l)(a)). But in
F no uncertain terms, the decision enjoins the court to submit affidavit evidence to critical examination to determine whether the action (or defence) could not possibly succeed. Lord Diplock in delivering the judgment of the Board had this to say [at p 1 col 2C–F]:

> The power to dismiss an action summarily without permitting the plaintiff to
G proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were
H sufficiently arguable to justify proceeding to trial. *In refusing to submit the evidence to critical examination, however, the Federal Court erred in law.* This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the new action could not possibly succeed.

I I recognize that a trial on affidavits would be clearly wrong. See *Pertama Malaysia Finance Bhd v Konrep Services Sdn Bhd & Ors.*[18] But in an application under O 18 r 19 or O 14, it is still incumbent upon the court to determine whether issues could more appropriately have been decided, without the expense of a full trial with witnesses and expenditure of the

courts' invaluable time. No party in a proceeding is entitled to require the court to accord them valuable time of several days open court viva voce trial only upon mere or bare assertions in their affidavits. Though, nevertheless, it is essential that affidavits in such applications filed should be confined to matters pleaded and not go beyond prima facie evidence of such matters pleaded.

The crucial question the court would have to ask itself in applications under O 14 or O 18 r 19(1)(a)–(d) is first, whether the piece or pieces of evidence essential to make out a reasonable prima facie cause of action or a prima facie triable issue of fact are of the nature such that they are adduceable by affidavit evidence; and secondly — if the answer to this question is in the positive — whether such essential prima facie evidence had been so adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must condescend or come definitely into particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable prima facie cause of action or a triable issue or issues of fact or law in the defence as the case may be.

In essence, prima facie evidence which is capable of being adduced by affidavit evidence ought to be so adduced even in summary proceedings. And due to the probable finality of the decision in such applications and in order to better consider the issues, an application before the hearing by the respondent for a short adjournment to file a supplementary affidavit should normally be allowed in the interests of justice.

Thus, O 18 proceedings whether they be under r 19(a), (b) or (c) — and for that matter also O 14 proceedings as well — are not decided by weighing mere assertions in the affidavits of both the parties. It is trite that the mere assertion in an affidavit of a given situation which is to be the basis of a claim or a defence, does not ipso facto provide immunity against the claim or defence from being struck out under r 19(a), (b) or (c), (or leave to defend refused in an O 14 matter); the court must and ought to look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a bona fide or prima facie cause of action, and the defendants (in an application to strike off the defence) have not only raised an issue but *also* that the issue is, prima facie, triable. The defendants have to make out a good prima facie defence only if the plaintiff's case is also prima facie a good one. See *Saw v Hakim*.[19]

It is this court's view that due to the current position of our courts, being choked up, hobbled, bridled and hamstrung with an ever increasing backlog of cases, no less contributed by the many frivolous claims (for unwarranted gain or advantage) and sham defences (designed for delay purposes), a fresh approach more in keeping with the times should be adopted when considering applications under O 14 and O 18 r 19 of the RHC. The minimum evaluation approach in the past, of affidavit evidence when deciding the issue of whether there is a reasonable cause of action in the claim, or triable issue in a defence, would have to give way to the optimum evaluation approach. I say optimum and not maximum no doubt because of the probative limitations attendant upon such summary procedure applications.

A time will come soon if not now when willy-nilly the court may have to adopt the optimum evaluation approach on summary application proceedings so as to confront the problem of baseless claims or defences head-on. It cannot be accused of doing hurried justice when public policy and administration of justice would not condone an abuse of process of the court and the court is clearly clothed with inherent jurisdiction under O 92 r 4 to prevent such abuse. In this fresh approach it is also envisaged that, in appropriate cases, O 33 r 2, O 14, O 34 r 8 and O 28 r 4 (see *Chang Siew @ Chang Siew Kee & Ors v Chang Sang @ Chen Yen Sang & Anor*[20]), besides O 18 r 19 discussed above, would increasingly be employed by parties and courts for expeditious disposal of cases.

Though not relevant to our current case, but nevertheless, as the same principles governing to O 18 r 19(1) applications are also applicable to O 14 matters, it may be appropriate here (for completeness) to remind ourselves the object of O 14 proceedings in the words of Halsbury LC in *Jacobs v Booth's Distillery Co*[21] who had this to say:

> People do not seem to understand that the effect of O 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, O 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

In our current case, there should be sufficient evidence in the affidavits read in conjunction of the statement of claim of the plaintiff to show that the latter is at least clothed with a reasonable prima facie cause of action against the defendants. Such prima facie evidence, in this case, the plaintiff had failed to disclose in any of her affidavits filed herein. Besides the fact that neither she nor her granduncle had paid any licence fee nor had either of them held any licence to occupy structure No 866 or any other building thereabouts, she did not produce even an iota of evidence to support her claim to equitable interest. There was no independent evidence — affidavit or otherwise, besides her bare averments — on the expenditure she claimed her granduncle had incurred in erecting structure No 866 or the consent to occupy allegedly received by her granduncle from the then landowner. On the balance of probabilities she had also failed to show on a prima facie basis why structure No 866 should not be considered part of the house No 107, which was occupied by her husband under licence No D3/41, in view of the close juxtaposition of the two structures. In this case, such prima facie evidence is eminently adduceable and ought to be adduced at this stage by affidavit evidence, if the court is to carry out an optimum evaluation to determine whether there was a reasonable cause of action.

Furthermore, the winds have been taken away from the sails of the plaintiff's contention that premises No TI 866 should be treated as separate from house No 107 due to separate assessment being paid, as I accept the defendants' counsel's rebuttal, that under the Local Government Act 1976

every structure or building has to be assessed and the fact that assessment was paid on TI 866 does not ipso facto signify that same should not be considered an appurtenance of house No 107.

I agree that if we were proceeding upon the suggestion that the pleadings do not disclose a cause of action, the improbability of the alleged facts would not be material, but when we are inquiring whether there are any reasonable grounds on which the plaintiff can expect to succeed, I think that we are not only at liberty, but bound, to look at the probability or improbability of the story upon which the plaintiff relies. I have before me her story, which is a very extraordinary and very improbable, although possible, story. Anything more shadowy, anything more unlikely to produce persuasion or conviction on the mind of the court from the affidavit filed to inform the conscience of the court as to the truth of the plaintiff's story I can scarcely imagine.

Those affidavits, not only by what they do say but by what they do not say, confirm my conclusion that the plaintiff has no reasonable ground for proceeding with this action. It was an abuse of the procedure, as the claim is incapable of proof and without firm basis; it was a despicable attempt by the wife to secure double compensation on what her husband was to receive from the defendants. I had therefore, on 2 February 1994, made an order in terms of encl 8 that the claim herein be struck out with costs.

Learned counsel for the plaintiff applied orally for adjournment of the matter into open court for further argument under s 68(2) of Courts of Judicature Act 1964 (O 56 r 2(2) has been repealed). I declined as the issues have been exhaustively canvassed before me in chambers.

The counsel then applied for a stay — of my said order in terms of encl 8 — pending an appeal to the Supreme Court. This was also refused as it is settled that an application for stay on the sole ground that if the structure is demolished, any appeal to the Supreme Court even if successful would be rendered nugatory, is by itself insufficient for this court to exercise its discretion in the plaintiff's favour. The plaintiff would also have to satisfy this court that she has arguable grounds of appeal. This was nowhere disclosed in the argument and the affidavits before me.

The last application for leave to the Supreme Court was also turned down as there are no new points of law involved herein — this being merely the case of a plaintiff who has attempted to raise the right to equitable interest by bare allegation — and I am of the opinion that the Supreme Court should also not be clogged with such baseless appeals. I had however indicated that I would write my grounds immediately.

Applications allowed.

Reported by Anne Khoo